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No. 90-1563
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

PATRICK McEVOY,

Petitioner.

# BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where petitioner was alleged to have violated several discrete subsections of the New York City Administrative Code provision regarding unlawful eviction of tenants, and where the proved facts supported petitioner's conviction with regard to the charges pursuant to some but not all of the cited subsections, was the adjudication of guilt of violation of the Code properly made by the trial court and affirmed on subsequent appeals?

2. Did petitioner's conviction for failure to repair and make safe and habitable his property for his tenants deprive him of his property without due process of law in contravention of the 14th Amendment to the United States Constitution?

3. Where petitioner himself had sought and received numerous adjournments of the criminal proceeding and where petitioner's

counsel, having received the benefit of those adjournments, gave priority to a civil matter in another court on the day on which the instant matter was to be tried, and where all but the initial stage of the criminal proceeding was conducted on petitioner's behalf by his counsel of choice, did the trial court abridge petitioner's right to effective counsel in contravention of the 6th Amendment to the United States Constitution?

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## STATEMENT OF THE CASE

The instant petition seeks review of the petitioner's conviction of unlawful eviction pursuant to certain provisions of the New York City Administrative Code, on the ground that such conviction, affirmed by an intermediate State appellate Court and review of which was refused by the New York State Court of Appeals, violated petitioner's rights

under the 6th and 14th Amendments to the United States Constitution.

On December 8, 1987, petitioner was tried before the Court for criminal violations of New York City Administrative Code Sections 26-521(a)(2) and (3), and (b), concerning unlawful eviction of petitioner's tenants, to wit:

> Unlawful eviction. a. It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer * * * except to the extent permitted by law pursuant to a warrant of eviction or other order of a Court of competent jurisdiction or a governmental vacate order by:
>
> * * *
>
> (2) engaging in a course of conduct which interferes with or is intended to interfere with or disturb the comfort, repose, peace or quiet of such occupant in the use or occupancy of the dwelling unit, to induce the occupant to vacate the dwelling unit including, but not limited to, the interruption or discontinuance of essential services; or

> (3) engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit * * *
>
> b. It shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore to occupancy an occupant of a dwelling unit who either vacates, has been removed from or is otherwise prevented from occupying a dwelling unit as the result of any of the acts or omissions described in subdivision a of this section and to provide to such occupant a dwelling unit within such dwelling suitable for occupancy, after being requested to do so by such occupant or the representative of such occupant, if such owner either committed such unlawful acts or omissions or knew or had reason to know of such unlawful acts or omissions, or if such acts or omissions occurred within seven days prior to such request.

At the commencement of the trial, counsel for petitioner stated that he was not the attorney whom petitioner wished to represent him, but was an associate of that attorney. Counsel asked for an adjournment

of the trial so that the attorney whom petitioner wished to conduct the trial would be able to do so. The People stated that this request was only the latest incident in a series of similar attempts by petitioner to delay the trial and that petitioner's counsel had been fully aware that the trial was to proceed on that day. The Court agreed that the matter should proceed and that counsel's engagement in a civil matter should not take precedence over this criminal trial.

The People proceeded to try the case. Then, after the lunch recess, petitioner's attorney of choice appeared. He informed the Court that he was engaged in civil proceedings in other courts and again requested an adjournment of the instant criminal prosecution. The Court noted that on December 1, the instant trial had been marked "final" for the following week. Counsel agreed but stated that he was

nonetheless involved in other matters. The Court noted that its records showed there had been adjournments for trial from August 24 to October 29; from October 29 to November 19; from November 19 to December 1; and finally from December 1 to December 7. The Court therefore refused to adjourn the proceedings further, and the trial continued.

During the course of the trial, the People expressly stated their position that the prosecution was based on petitioner's course of conduct in the manner in which the buildings in issue had been maintained as well as on petitioner's failure to cure conditions for which notices of violation had been issued.

By judgment of May 5, 1988, the trial Court found petitioner guilty under N.Y.C. Ad. Code §§26-521(a)(2) and (3) and (b). The Court found that petitioner had been

aware of certain dangerous conditions and in addition had failed to perform certain other basic repairs (e.g., to the plumbing). The Court found that the People had proved beyond a reasonable doubt that petitioner had engaged in a course of conduct calculated to drive his tenants from their apartments.

Petitioner thereafter appealed his conviction to an intermediate appellate Court of the State of New York, which unanimously upheld the conviction. Petitioner then sought leave to appeal to the New York State Court of Appeals, which denied the application, in an order dated September 4, 1990.

Pursuant to the sentence, petitioner commenced service of a 90-day jail term. During that period, he sought a writ of habeas corpus in the United States District Court for the Southern District of New

York. Petitioner's release from custody rendered the petition moot and the petition was, accordingly, denied, by order dated November 20, 1990 (Leisure, U.S.D.J.).

Petitioner then sought reconsideration of the matter in the New York State Court of Appeals, which, in an order dated January 7, 1991, granted reconsideration but adhered to the prior determination that petitioner had presented no question of law warranting review by that Court.

Petitioner now seeks a writ of certiorari from this Court.

**REASONS FOR DENYING THE WRIT**

Petitioner herein presents three points on which he bases his challenge to his conviction of violation of the New York City Administrative Code, Section 25-521. It is respectfully submitted that none of the grounds proffered in support of the petition

has merit. The petition should, therefore, be denied.

Petitioner states that Section 25-521(b) makes it unlawful for an owner to refuse to restore to occupancy a tenant who has been unlawfully removed from occupancy after such restoration has been requested by such tenant, but that in the instant case, the criminal information under that section was dated the same day that the tenant in issue mailed her request to be so restored to her apartment. Petitioner claims that this factual scenario rendered his conviction infirm.

The People submit that, assuming the record showed the conviction under subsection (b) was improperly made, nonetheless the evidence clearly established violations of subsections (a)(2) and (3) of Section 25-521. The conviction for such violations was fully supported by the Record

and properly upheld on appeal in the State courts.

In his second point, petitioner argues that the requirement that he repair the buildings in question operated to deprive him of his property without due process, since, he claims, such repairs would be economically "unfeasible." This argument too is without merit.

The tenants at the subject premises were occupying their units legally and petitioner was merely asked to make the repairs necessary to make the building safe under the New York City Building Code. Moreover, petitioner had the option of pursuing the administrative remedy available to him (application for hardship exemption) if he believed the costs of effecting compliance were too costly, but he failed to avail himself of this option. Petitioner's own dereliction in maintaining the building, in

addition to his willful refusal to make repairs and the creation of a hazardous condition therein, would, arguably, have barred him from the relief of a hardship defense in any event.

Atco-Midwood Associates v. Benitez, 106 AD2d 501, 482 NYS2d 839 (2d Dept. 1984), cited by petitioner, is not to the contrary. In Atco-Midwood, the New York Supreme Court, Appellate Division found it was error for the trial court, having found the buildings unsound and hazardous, not also to consider evidence that the conditions had been created by the owners. The Appellate Division therefore ordered a remand for exploration of the possibility of equitable relief for the tenants, should the owners be found to have created the hazardous conditions. In the instant case, petitioner was found guilty of creating or fostering unsafe conditions.

Furthermore, in the instant case, although the issue of economic hardship had been litigated at some length in another matter involving these properties, the fact is that on the record below petitioner simply did not offer proof as to the economic hardship of restoring the building to its pre-collapse viability and returning the former tenants. Moreover, it is not at all clear that economic hardship is available as a defense to a criminal prosecution. Again, petitioner was not charged with an unlawful building collapse; he was charged with unlawful eviction - that is, engaging in a course of conduct designed to drive tenants from their homes, which conduct long pre-dated the collapse. Petitioner's culpability for unlawful eviction was established by acts before and after the collapse.

Finally, it is submitted that petitioner's argument that he was deprived of his right to effective assistance of counsel, contrary to the provisions of the Sixth Amendment, is without merit. United States v. King, 762 F2d 232, 235 (2d Cir. 1985), cited by petitioner, is on point: "A motion for an adjournment of the scheduled start of trial is addressed to the sound discretion of the trial judge.... To show abuse of that discretion, the defendant must demonstrate that the court's denial of a continuance was arbitrary and substantially impaired his defense.... Here we can hardly regard the District Court's action as arbitrary, and we conclude that any detriment suffered by King resulted from his own dilatory conduct and not from the Court's ruling...."

In the instant case, petitioner maintains that the Court refused to grant a "reasonable" adjournment because of the

engagement of his attorney on another matter. But the record shows that the trial of the instant matter had been delayed a number of times at petitioner's own request, and only a few days before the trial started, petitioner had received yet another adjournment and was then given a firm trial date. Moreover, the other engagements of counsel were in civil, not criminal, cases, and there is nothing in this record to show their urgency as transcending that of the instant matter. Furthermore, petitioner had his counsel of choice conducting the trial with the exception of the very opening procedures. The trial transcript showed no way in which the defense was impeded by the Court's instruction to proceed.

Accordingly, the New York Supreme Court, Appellate Term correctly affirmed the judgment of conviction. Leave to appeal was, in turn, correctly denied by the New

York State Court of Appeals. There is no argument here presented which warrants review by this Court.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.**

May 30, 1991

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